
RELIGION AND THE BURDEN OF PROOF:
POSNER'S ECONOMICS AND PRAGMATISM
IN *METZL V. LEININGER*

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What governmental practices violate the prohibition against establishing religion in a society that prints "In God We Trust" on money and opens legislative sessions with prayer? To some, the legal treatment of Christianity in America smacks of prohibited endorsement.¹ Others argue that U.S. courts have stripped religion from public life while distorting American history and denuding collective activities of meaning.²

The clash between these two views could jeopardize America's relative religious peace. Justice Breyer sought to avoid the clash when, on the same day he rejected one Ten Commandments display,³ he provided, with this explanation, the crucial fifth vote upholding another.⁴ He wrote:

[T]o reach a contrary conclusion here . . . would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions. Such a holding might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.⁵

Richard Posner translated Justice Breyer's words to warn that forbidding all governmental displays of sacred religious texts

would trigger an ACLU-led campaign to purge the entire public space of the United States of displays of the Ten Commandments, ubiquitous as

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¹ See, e.g., LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE* 142 (1st ed. 1994); Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083 (1996); see also *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 604–05 (1989) ("The history of this nation, it is perhaps sad to say, contains numerous examples of official acts that endorsed Christianity specifically. . . . [T]his heritage of official discrimination against non-Christians has no place in the jurisprudence of the Establishment Clause.")

² See, e.g., STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* (1993); TIMOTHY L. HALL, *SEPARATING CHURCH AND STATE* (1998); RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE* (2d ed. 1984).

³ See *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722 (2005).

⁴ See *Van Orden v. Perry*, 125 S. Ct. 2854, 2868 (2005) (Breyer, J., concurring in the judgment).

⁵ *Id.* at 2871.

they are. It is hard to imagine not only a more divisive, but also a more doctrinaire and even absurd project, faintly echoing as it would the campaigns of Republican Spain and the Soviet Union in the 1930s against the churches of those countries, not to mention the destruction of religious images by the Iconoclasts of eighth-century Byzantium.⁶

Here is Posner the scholar: polymath and critic, audacious and unequivocal. But he is also a distinguished judge, contributing both binding decisions and instructive opinions. How does he translate his theories into judicial decisions? Known best as the leading proponent of economic analysis in law, Judge Posner has also pressed a particular view of pragmatic judging. Which — if either — characterizes his own judging in the highly charged context of religious freedom?

A vivid test case arose when Judge Posner faced an Establishment Clause dispute ten years before his comment on the recent Ten Commandments cases. In *Metzl v. Leininger*,⁷ he considered the constitutionality of a state statute closing public schools on Good Friday.⁸ Wisely, his pragmatic judging included but also trumped his economic analysis.

I. ECONOMICS AND PRAGMATISM

Shock met Posner when he first brought economic analysis to legal problems such as the adoption of babies,⁹ criminal justice policies,¹⁰ and intimate sexual behavior.¹¹ Today, no law teacher can ignore efficiency or the effects of legal rules on human behavior and welfare. Critics of the economic analysis of law persist, of course,¹² but in field after field over the past thirty years, it has become mainstream.¹³

⁶ Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 100 (2005).

⁷ 57 F.3d 618 (7th Cir. 1995).

⁸ Illinois had eliminated Good Friday as a legal state holiday but preserved it as a school holiday. *Id.* at 619. As of 2007, ten states maintain Good Friday as a legal state holiday. See State Holidays, <http://www.infoplease.com/ipa/A0002069.html> (last visited Feb. 10, 2007).

⁹ See Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978); Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59 (1987).

¹⁰ See, e.g., Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985).

¹¹ See, e.g., RICHARD A. POSNER, *SEX AND REASON* (1992); Richard A. Posner, *Cross-Cultural Differences in Family and Sexual Life: An Economic Analysis*, 5 RATIONALITY & SOC'Y 421 (1993).

¹² See, e.g., Jeanne L. Schroeder, *Just So Stories: Posnerian Methodology*, 22 CARDOZO L. REV. 351 (2001); Francis C.F. Ghang, *Disguised Subjectivity: Posner's Economic Analysis of Sex*, 5 CRIM. L.F. 733 (1994) (reviewing POSNER, *supra* note 11).

¹³ For the reach of law and economics, both across areas of law and around the globe, see Richard A. Posner, *Foreword to 1 ENCYCLOPEDIA OF LAW AND ECONOMICS*, at xii, xii–xiii (Boudewijn Bouckaert & Gerrit De Geest eds., 2000), available at <http://encyclo.findlaw.com/foreword.html>.

Gary Becker, Ronald Coase, Guido Calabresi, and William Landes helped develop law and economics.¹⁴ But Posner has been its leading exponent and central figure.

Only “everyday pragmatism” rivals economics as Posner’s judicial philosophy in the astonishingly numerous publications he has authored since he joined the bench. Judging may have prompted Judge Posner to back away from the rigors of economic analysis, or perhaps he found “pragmatist” ways to insinuate his commitment to economic analysis of law. Assessing the influence of Posner on legal pragmatism is tricky, for he is not its founder. Trace legal pragmatism back and you will find Oliver Wendell Holmes, Jr.’s and John Dewey’s writings on law as frequently cited as the philosophic works of Charles Peirce and William James.¹⁵ Current legal theorists, including Daniel Farber, Thomas Grey, and Margaret Radin, advocated pragmatism as jurisprudence before Posner did, although without the authority of judicial experience.¹⁶

Assessing the influence of Posner’s pragmatism is further complicated by his own shifting statements,¹⁷ by the general ambiguity of pragmatism’s meaning,¹⁸ and by the economic coloration Posner gives

¹⁴ See Steve Kurtz, *Sex, Economics, and Other Matters: An Interview with Richard A. Posner*, REASON, Apr. 2001, at 36, 38–39.

¹⁵ Holmes’s *Common Law* criticized abstraction and linked legal decisions to the power of the privileged. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (Dover ed. 1991) (1881). Holmes, Peirce, and James developed pragmatism in their “Metaphysical Club” in the 1870s. See JAMES T. KLOPPENBERG, *UNCERTAIN VICTORY* (1988); BRUCE KUKLICK, *THE RISE OF AMERICAN PHILOSOPHY: CAMBRIDGE, MASSACHUSETTS 1860–1930* (1989); LOUIS MEN-AND, *THE METAPHYSICAL CLUB* (2001).

¹⁶ See Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988); Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989); Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699 (1990); Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781 (1989).

¹⁷ For example, while advocating pragmatist judging, he also notes: “To say that one is a pragmatist is to say little.” RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 28 (1990).

¹⁸ Assessing Posner’s pragmatism can be confusing because the term is appropriated by people who do not pursue the admittedly conflicting commitments of its originators. Charles Peirce thought science would produce enduring truths; William James and John Dewey disagreed. Richard Rorty is a leading self-proclaimed pragmatist, but he may also be a betrayer of pragmatist thought. See PRAGMATISM (Robert Hollinger & David Depew eds., 1995); J.M. Balkin, *The Top Ten Reasons To Be a Legal Pragmatist*, 8 CONST. COMMENT. 351 (1991); Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 U. ILL. L. REV. 163. Ronald Dworkin stands as the theorist most opposed to pragmatist judging because it ignores ideals and rights while elevating effects and interests. But some say Dworkin’s work fits his own definition of legal pragmatism. Compare RONALD DWORKIN, *LAW’S EMPIRE* 161 (1986), with Stanley Fish, *Almost Pragmatism: The Jurisprudence of Richard Posner, Richard Rorty, and Ronald Dworkin*, in PRAGMATISM IN LAW AND SOCIETY 47 (Michael Brint & William Weaver eds., 1991), and Steven Knapp, *Practice, Purpose, and Interpretive Controversy*, in PRAGMATISM IN LAW AND SOCIETY, *supra*, at 323. Some read Dworkin as a pragmatist who seeks the public good while looking to the future. See Radin, *The Pragmatist and the Feminist*, *supra* note 16, at

it. Posner resists the philosophic tradition of American pragmatism,¹⁹ characterized by rejection of absolute foundations for norms or facts, commitment to critical debate, and appreciation of ideas for their effects.²⁰ Missing from Posner's view of judging and democracy are the radically deliberative practices implied by philosophic pragmatism.²¹

Although Judge Posner's pragmatism is distinguishable from his economism, the two approaches overlap.²² Both elevate consequences over other features of ideas or decisions.²³ His pragmatist judge, like a good economist, "wants to come up with the best decision having in mind present and future needs."²⁴ It is impossible to sort out when Posner's attention to consequences reflects his pragmatism as opposed to his economic analysis. He suggests that the pragmatist judge departs from economic analysis by considering not only utility but also whether "utility [is] the right criterion."²⁵ Is life imprisonment without the possibility of parole a proper sentence for a sixteen-year-old who sold a single marijuana cigarette? Utility may be a relevant consideration, but so is the social meaning of imprisonment in that person's community.²⁶ But of course, effects of social meaning are themselves relevant to both individual and social utility.²⁷

1722; Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 423–24 (1990). Pragmatist or not, Dworkin sets himself in opposition to Posner. See RONALD DWORKIN, *JUSTICE IN ROBES* 75–104 (2006).

¹⁹ See Matthew H. Kramer, *The Philosopher-Judge: Some Friendly Criticisms of Richard Posner's Jurisprudence*, 59 MOD. L. REV. 465 (1996) (reviewing RICHARD A. POSNER, *OVERCOMING LAW* (1995)). Philosophically, pragmatism calls for empirically testing hypotheses and opposes deductive reasoning from a priori grounds. Posner may draw distance from the original pragmatists due to their political progressivism or their embrace of ideals, tested through criticism and practice. See Michael Sullivan & Daniel J. Solove, *Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism*, 113 YALE L.J. 687, 713–14 (2003) (reviewing RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003)).

²⁰ For thoughtful treatments of philosophic pragmatism, see *THE REVIVAL OF PRAGMATISM* (Morris Dickstein ed., 1998) and *PRAGMATISM, OLD & NEW* (Susan Haack & Robert Lane eds., 2006).

²¹ See POSNER, *LAW, PRAGMATISM, AND DEMOCRACY*, *supra* note 19, at 158–78 (preferring democracy for its electoral checks rather than its potential for collective deliberation). For discussion of the role of deliberative processes in philosophical pragmatism, see CHERYL MISAK, *TRUTH, POLITICS, MORALITY: PRAGMATISM AND DELIBERATION* (2000).

²² See Richard A. Posner, *What Has Pragmatism To Offer Law?*, 63 S. CAL. L. REV. 1653, 1667–69 (1990). As Professor Richard Fallon notes, whether a theory is "workable" — the prime pragmatist test — is closely related to whether it promotes economic efficiency. Richard H. Fallon, Jr., *How To Choose a Constitutional Theory*, 87 CAL. L. REV. 535, 559–60 (1999).

²³ But the pragmatist might be agnostic about value theory. See ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* 83–85 (2006) (describing a value theory as "an account of which consequences are good or bad" and criticizing Posner's pragmatist approach for lack of such an account).

²⁴ Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 5 (1996).

²⁵ *Id.* at 14.

²⁶ See *id.* at 13–14.

²⁷ See ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000).

Posner further distinguishes his legal pragmatism from economic utilitarianism by rejecting metaphysics and grand theory.²⁸ Posner's everyday pragmatist rejects abstract moral and political theory, but he remains open to other theories, including economics.²⁹ Like economists, pragmatist judges should use law to achieve desired ends. Yet the judge employs intuition in selecting these ends and in resolving probabilities and gaps in evidence.³⁰ Unlike economics, pragmatism offers help when rationalism runs out: "[H]ere the pragmatic counsel . . . to the legal system is to muddle through, preserve avenues of change, do not roil needlessly the political waters."³¹

As a scholar, Posner directs pragmatist judges to elevate "rule of law" values like predictability and administrability, risking desirable outcomes in a given case. Pragmatist judges should sometimes embrace precedent rather than consequences. Welfare maximization in a given case gives way to the greater good offered by predictable rules. Using precedent is more efficient than thinking through a problem from scratch.³² Indeed, as a judge, Posner saved some effort in the court's treatment of the Good Friday holiday, yet not by following precedent. Instead, the decision ingeniously converted a high-profile question into an occasion for muddling through.

II. METZL V. LEININGER

Judge Posner's court reviewed an Illinois federal district court's decision enjoining the state from closing all public schools on Good Friday. Illinois's 1941 law made Good Friday a state holiday. More than fifty years later, a teacher claimed the law illegally preferred and endorsed Christianity.³³ The teacher's claim echoed arguments that non-Christians can feel excluded or demeaned by Sunday closing laws, Christmas carols in public schools, and the cross in the government

²⁸ See Richard A. Posner, *Legal Pragmatism Defended*, 71 U. CHI. L. REV. 683, 684 (2004); see also POSNER, *supra* note 21, at 24–56; Posner, *supra* note 22, at 1667–68.

²⁹ See Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1 (1998); Posner, *supra* note 24.

³⁰ Posner indicates that reasoning over means is productive but reasoning over ends is not because ends inevitably reflect politics and convention. See Richard A. Posner, *Reply to Critics of The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1796, 1802–03 (1998).

³¹ Posner, *supra* note 22, at 1668. The pragmatist judge neither accepts the status quo nor pushes for change. See Sullivan & Solove, *supra* note 19, at 706–09.

³² See Posner, *supra* note 24, at 5.

³³ Metz v. Leininger, 850 F. Supp. 740, 740 (N.D. Ill. 1994).

seal.³⁴ But, by ruling for the plaintiff, did the district court marginalize religion and its adherents?³⁵

The confused Establishment Clause jurisprudence reflects rather than resolves this conflict. Under the ostensible test for assessing Establishment Clause challenges, announced by the Supreme Court in *Lemon v. Kurtzman*,³⁶ a government policy violates the Constitution if it (1) lacks a clear secular purpose; (2) as its primary effect advances or inhibits religion; or (3) fosters excessive government entanglement with religion.³⁷ Any one of these three elements produces a constitutional violation. Courts used this test to reject many practices, including sharing public instructional materials and social services with parochial schools.³⁸ Yet the line between permissible and impermissible support proved difficult to draw, as did the relationship between forbidden and required accommodation of religious free exercise. The *Lemon* test inspired so many criticisms that one author announced, “*Lemon* is Dead.”³⁹

The test, although not overruled, no longer frames Supreme Court analysis, but neither does it have a clear replacement. Potential alternatives include testing for government endorsement of religion⁴⁰ or for coercion of individual participation in religious practice.⁴¹ The Supreme Court now seldom cites *Lemon*, though other courts and legal authorities use it.⁴² Even without *Lemon*, secular purpose still seems key, but it remains unclear whether that rationale must be explicit, dominant, or exclusive to survive constitutional attack.

³⁴ See, e.g., Suzanna Sherry, *Religion and the Public Square: Making Democracy Safe for Religious Minorities*, 47 DEPAUL L. REV. 499, 517 (1998) (discussing the negative impact of religion in public life for religious minorities because “[i]n America, public religion is always Christianity”).

³⁵ See *id.* at 499–500 (summarizing the position of scholars who argue that “there is not enough religion in our public life”); see also NEUHAUS, *supra* note 2 (espousing such a position); Mary Ann Glendon, *The Naked Public Square Today: A Secular Public Square?* (Oct. 2004) (unpublished manuscript), available at <http://web.princeton.edu/sites/jmadison/events/conferences/>.

³⁶ 403 U.S. 602 (1971).

³⁷ *Id.* at 612–13.

³⁸ See *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 383, 397–98 (1985), overruled by *Agostini v. Felton*, 521 U.S. 203 (1997); *Meek v. Pittenger*, 421 U.S. 349, 358–59, 372 (1975), overruled by *Mitchell v. Helms*, 530 U.S. 795 (2000).

³⁹ Michael Stokes Paulsen, *Lemon is Dead*, 43 CASE W. RES. L. REV. 795 (1993). By 1993, five members of the then-sitting Supreme Court had condemned the *Lemon* test. See *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring in the judgment) (listing opinions in which he and Justices White, Rehnquist, O’Connor, and Kennedy criticized *Lemon*).

⁴⁰ See *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 592–94 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 688, 690–94 (1984) (O’Connor, J., concurring).

⁴¹ See *Lee v. Weisman*, 505 U.S. 577, 586–99 (1992).

⁴² See, e.g., *Ams. United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1543 (6th Cir. 1992) (en banc); State of Tenn. Office of the Att’y Gen., Opinion No. 04-095, *Public School System’s Calendar — Day Off on Religious Holiday* (May 18, 2004), available at <http://www.attorneygeneral.state.tn.us/op/2004/OP/OP95.pdf>.

Illinois faced hurdles in claiming a secular purpose for its Good Friday school closure law. A year after the law's enactment, the Illinois governor issued a public proclamation describing the day as "charged with special meaning to multitudes throughout the Christian world" and commending "the sacred rights and ceremonies of the occasion to thoughtful consideration of churchgoers and believers throughout our State."⁴³ In addition, unlike Christmas and Thanksgiving, Good Friday seems to have no secular significance.⁴⁴ The district court accepted the plaintiff's challenge.⁴⁵

On appeal, Illinois asserted that the Good Friday school closing statute simply saved the state the expense of keeping schools open on a day with low student attendance.⁴⁶ But, as the state acknowledged, Illinois law permitted individual students to miss school for religious observance, and local school districts could close if many local residents observed a particular religious holiday. Indeed, particular districts closed on Jewish holidays.⁴⁷

The appellate court knew that the Ninth Circuit had already upheld a similar law in Hawai'i by ruling that Good Friday had acquired a secular status as the first day of a three-day weekend devoted to spring shopping and recreation.⁴⁸ Should the Seventh Circuit follow suit, or instead reject the statute as an impermissible establishment of religion? The judges surely knew that this case would be hotly disputed and that doctrinal analysis could support either conclusion.⁴⁹

Writing for the majority, Judge Posner made no reference to the *Lemon* test.⁵⁰ The court recognized that Good Friday was a religious holiday without secular rituals,⁵¹ noted the religious purpose expressed in the Governor's proclamation, and identified the advantage to Chris-

⁴³ *Metzl*, 57 F.3d at 619 (internal quotation marks omitted).

⁴⁴ *See id.* at 620.

⁴⁵ *See Metzl v. Leininger*, 850 F. Supp. 740, 740 (N.D. Ill. 1994).

⁴⁶ *See Metzl*, 57 F.3d at 621.

⁴⁷ *See id.* at 619, 621.

⁴⁸ *See id.* at 622 (discussing *Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991)); *see also* Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503, 522-25 (1992) (criticizing *Cammack*).

⁴⁹ For other examples, not cited by Posner, of courts striking down similar laws, *see Mandel v. Hodges*, 127 Cal. Rptr. 244, 253-56 (Ct. App. 1976), which struck down an executive order closing all state offices Good Friday afternoon, and *Griswold Inn, Inc. v. Connecticut*, 441 A.2d 16, 22 (Conn. 1981), which rejected a state statute prohibiting liquor sales on Good Friday.

⁵⁰ Critics say the opinion implicitly changed the test by suggesting that satisfying the secular purpose prong alone would save the statute. *See* Phillip M. Kannan, *Symbolic Logic in Judicial Interpretation*, 27 U. MEM. L. REV. 85, 98-99 (1996); *see also* Recent Case, 109 HARV. L. REV. 693, 695 (1996).

⁵¹ Because Posner cited theologians' affidavits to that effect, *Metzl*, 57 F.3d at 620, the appeals court did not deserve the assertion that after this "ridiculous opinion[,] . . . Posner's next targets must be Christmas and Thanksgiving." Steven G. Calabresi, *The Congressional Roots of Judicial Activism*, 20 J.L. & POL. 577, 591 n.53 (2004).

tian students who, unlike their Jewish classmates, would face no make-up duties after missing school on their religious holiday.⁵² Yet the court resisted concluding that the statute's purpose was to promote religious observance and held open the possibility that the statute had acquired an acceptable secular purpose.⁵³

So, how to conclude? Judge Posner devised an unprecedented approach: his opinion identified the likely student attendance on Good Friday as a question of fact and assigned the burden of producing evidence on that question to Illinois.⁵⁴ The court found no prior authority allocating the burden of production in this context, but reasoned that it belonged with the state for two reasons: first, the attendance issue would amount to a defense against the Establishment Clause challenge, and defendants typically have the burden of proof on a defense;⁵⁵ and second, the state would be able to obtain evidence of likely school attendance at a lesser expense than the plaintiff.⁵⁶

Under this rule, the state had to lose. The state failed to introduce any evidence to support such a defense⁵⁷ — perhaps because prior to this decision, no one knew that actual evidence of student attendance on Good Friday had to be introduced or that the burden of producing that evidence would fall on the defendant. While affirming the district court's injunction and declaratory relief, the appeals court made clear that Illinois public schools still could close on Good Friday through several routes. For statewide school closings, the state could adopt an explicitly secular rationale, such as a specified spring vacation weekend.⁵⁸ Or the state could simply retain its existing rule, allowing local districts to close based on their own assessments of likely attendance.⁵⁹

The decision, therefore, could be characterized in contrary ways: first, the court could be viewed as enjoining Illinois from closing its schools on Good Friday; or second, the court could be viewed as showing Illinois how to preserve the Good Friday school closure. Meanwhile, Judge Posner transformed a controversial and difficult constitutional question about the public place of religion into a technical procedural and evidentiary matter. Contrast the Ninth Circuit's

⁵² *Metzl*, 57 F.3d at 621.

⁵³ *Id.*

⁵⁴ *Id.* at 622. Likely teacher attendance would be another factual issue.

⁵⁵ The dissent urged a burden shift as in Title VII discrimination doctrine. *See id.* at 625 (Manion, J., dissenting). There, the defendant has the burden to produce evidence on a defense, but the burden of persuasion remains at all times with the plaintiff. *See id.* Judge Manion would have reversed the district court decision because the plaintiff failed to carry the burden of persuasion. *Id.* at 627.

⁵⁶ *Id.* at 622 (majority opinion).

⁵⁷ *Id.* at 623.

⁵⁸ *Id.* at 623–24.

⁵⁹ *See id.* at 624.

treatment of Good Friday as a secularized holiday. By minimizing the actual religious meaning of the holiday, it both offended Christians and antagonized non-Christians.⁶⁰ But absolutely rejecting the Good Friday school closure could provoke the religious majority. Judge Posner's solution avoided these pitfalls and defused a potential culture war.⁶¹ His opinion kept the federal court untarnished by charges either of capitulating to the religious majority or of engaging in a politically correct campaign to remove religion from public life. To achieve this feat, he pragmatically used, but also departed from, economic analysis.

A. Law and Economic Analysis

Outside of his judicial role, Posner has directly applied economic analysis to the Establishment Clause.⁶² Economic analysis could go even further by shifting to religious groups the societal costs of accommodating religion.⁶³ As judge, Posner temporized with the burden of production.⁶⁴ His turn to the burden of proof is a classic, efficient solution to a difficult legal question. Judges provide answers rather than endless debates not because judges are smarter than others, but because the judge's job is to provide actual decisions, albeit sometimes arbitrary ones. Novelist John Barth illustrates the use of arbitrary decisional devices when one character in *The End of the Road* solves the emotional paralysis of another by advising:

If the alternatives are side by side, choose the one on the left; if they're consecutive in time, choose the earlier. If neither of these applies, choose the alternative whose name begins with the earlier letter of the alphabet. These are the principles of Sinistrality, Antecedence, and Alphabetical Priority⁶⁵

⁶⁰ See Mike Nichols, *Holy Day Fight Is One Grafton Can't Win*, MILWAUKEE J. SENTINEL, Sept. 23, 1998, at B1 ("While continental Christians are contemplating the suffering of Christ, Hawaiians are apparently waterskiing.")

⁶¹ See Charles C. Haynes, Religious Liberty in Public Life, http://www.fac.org/rel_liberty/publiclife/overview.aspx (last visited Feb. 10, 2007).

⁶² See Posting of Richard Posner to The Becker-Posner Blog, http://www.becker-posner-blog.com/archives/2005/08/the_ten_command.html (Aug. 15, 2005, 01:08 CST) ("If secular activities are not being subsidized, I don't think there is a strong economic case for religious subsidies any more than for other private goods" unless the government is using religious symbols such as the Ten Commandments to "propagandize" on behalf of uncontroversial moral principles.")

⁶³ Thanks to Jed Shugerman for this thought.

⁶⁴ Thus, contrary to the worries of a student commentator, see Recent Case, *supra* note 50, the *Metzl* opinion postponed ultimate conclusions about the relationship among the *Lemon* factors, or the viability of *Lemon*. See *Metzl*, 57 F.3d at 621 (noting that "[t]he governor's proclamation is not definitive evidence of the statute's original purpose" and that its justification may have changed over time); see also *id.* at 622 (analyzing the burden of proof).

⁶⁵ JOHN BARTH, *THE END OF THE ROAD* 79–80 (rev. ed. 1967).

The burden of proof similarly replaces uncertainty and debate with decisions. Time is saved at the small price of some arbitrariness. Assigning the burden of producing evidence to the party who can most cheaply find the information adds further savings. The state can consult its attendance records or survey its families more easily than the plaintiff can generate student attendance information.⁶⁶

These efficiencies apply solely to the production burden, not to the burden of persuading the decisionmaker, as Judge Manion's dissent notes.⁶⁷ Inevitably, the burden of persuasion reflects a value judgment: given doubt, should the plaintiff claiming an Establishment Clause violation or the defendant government actor win? Perhaps Judge Posner too efficiently omitted both this question and the dissent's proposed answer.

Also, the appeals court perhaps too expeditiously applied the burden immediately upon its announcement rather than remanding. The state had introduced no evidence about how many students and teachers in each district would miss school if it were held open on Good Friday. The court took judicial notice of the fact that most Illinois residents are Christian, but not of their degree of observance, or of local variations in likely school attendance on Good Friday.⁶⁸ Even if the court had remanded, how could the state produce relevant evidence? Closed on Good Friday for more than fifty years, the schools had no relevant records. A survey might have been costly and unreliable. Applying the burden of production saved the court needless further consideration of this case — though it could create work for future defendants.⁶⁹

The *Metzl* court avoided the difficult doctrinal and political merits, left the Establishment Clause analysis ambiguous, and shifted the action to the legislature and local school districts.⁷⁰ The court allowed the political branches, media pundits, families, and local school districts to debate the matter. These deliberative possibilities were not

⁶⁶ The burden of production can also promote efficiency if placed on the party best able to spread the cost of gathering information.

⁶⁷ *Metzl*, 57 F.3d at 625 (Manion, J., dissenting); see also *supra* note 55.

⁶⁸ *Metzl*, 57 F.3d at 621.

⁶⁹ For another instance of Posner shifting the cost of determination from the court to the parties, see *Walgreen Co. v. Sara Creek Property Co.*, 966 F.2d 273, 275 (7th Cir. 1992) (directing injunctive relief to trigger party settlement).

⁷⁰ To date, the Supreme Court has followed its own evasive path, denying review of Good Friday public holidays. See *Koenick v. Felton*, 190 F.3d 259 (4th Cir. 1999), *cert. denied*, 528 U.S. 1118 (2000); *Bridenbaugh v. O'Bannon*, 185 F.3d 796 (7th Cir. 1999), *cert. denied*, 529 U.S. 1003 (2000); Joan Biskupic, *Justices Reject Church-State Case*, WASH. POST, Jan. 19, 2000, at A6; *Court Rejects Suit over Indiana's Good Friday Holiday*, CHI. TRIB., Mar. 6, 2000, Evening Update, at 1; see also Megan E. Kleinfelder, Comment, *Good Friday, Just Another Spring Holiday?*, 69 U. CIN. L. REV. 329, 351 (2000) (concluding that *Metzl* set the burden of proof too high, *Koenick* set it too low, and the *Bridenbaugh* panel set it just right).

Judge Posner's purpose — but they are valuable effects of his pragmatist decision.

B. Pragmatism as Temporizing

Posner the judge punted in *Metzl*. Posner the pragmatist could chime in, “and that’s a good thing, too.” Headlines announced that the court’s decision struck down a law that had been on the books for fifty years, but opened avenues for reinstating the Good Friday school holiday. The decision efficiently resolved the case but not the larger dispute; it shifted the result off the official screen⁷¹ and, without transparency, let the school holiday persist.⁷²

For those who value judicial candor,⁷³ *Metzl* is perplexing. Judge Posner’s opinion remains mum both about what ultimately would count as a secular rationale and about the benefits of ducking that question. Of course, if Judge Posner thinks, prudentially, the federal courts should let debate over the Good Friday school holiday simmer as communities permit local accommodations, silence about his reasons comports with his prudence. Candor while sidestepping a hot issue can be self-defeating.

In blogs and scholarship, Posner *does* satisfy those who seek candor.⁷⁴ He elaborates his Establishment Clause theory and warns against backlash⁷⁵ should federal courts continue to remove signs of Christianity from public settings. But as judge, he chose the

⁷¹ Two critics argue that Posner’s pragmatism is conservative, more inclined toward efficient dispute resolution than public deliberation about community goals. See Sullivan & Solove, *supra* note 19, at 741.

⁷² Five years after the decision, Illinois apparently still closed schools on Good Friday, without new legislation. See Ill. State Bd. of Educ., Plenary Business Meeting, Agenda Topic: Cumulative Waiver Report and Recommendations (Jan. 20, 2000), available at [http://www.isbe.net/board/meetings/janmeeting/waiver cover.doc](http://www.isbe.net/board/meetings/janmeeting/waiver%20cover.doc).

⁷³ See, e.g., Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296 (1990); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987). But see Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307 (1995).

⁷⁴ For example, Posner writes:

[L]et me respond to the comment about “one of the quirkiest Posner opinions of all time. Have you ever wondered what water skiing in Hawaii had to do with the establishment clause?” The opinion, *Metzl v. Leininger*, 57 F.3d 618 (7th Cir. 1995), is actually quite straightforward. The issue was whether Illinois had violated the establishment clause by making Good Friday a public school holiday. Christmas is of course a public school holiday, so the issue narrowed to whether there is a difference. The difference, which is important to the Supreme Court and so has to be to me as a judge whatever my personal views, is that Christmas has become so far secularized that making it a holiday is not widely interpreted as signifying governmental endorsement of religion or Christianity. Good Friday, it turns out, has not become secularized — except maybe in Hawaii, where it kicks off a spring holiday weekend.

Posting of Richard Posner to The Becker-Posner Blog, http://www.becker-posner-blog.com/archives/2005/08/the_ten_command_1.html (Aug. 21, 2005, 10:58 CST).

⁷⁵ For a discussion of backlash incited by federal courts’ opinions, see Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 473–82 (2005).

inefficient and opaque route of irresolution, ongoing debate, and accommodation.

He sought irresolution more than political deliberation and social change, which he has eschewed elsewhere. Critics could chide Posner for implicitly ducking principle and controversy. Yet, the effects of his opinion are admirable. The *Metzl* decision pushed the disestablishment of Christianity. Only secular rationales count, and the state cannot presume, without gathering facts, that Good Friday is a holiday warranting school closure. America's ever-increasing religious diversity⁷⁶ and a view of law as embedded in political and social debate⁷⁷ make this a wise, if not notably efficient, decision.

⁷⁶ Increasing religious diversity will strain the views of those such as Bill O'Reilly, who on Fox News called the idea of closing public schools for the observance of Muslim holidays "absurd in a Judeo-Christian country." Joseph Brown, *O'Reilly: Closing Public Schools for Muslim Holiday "Absurd in a Judeo-Christian Country,"* MEDIA MATTERS FOR AM., Oct. 28, 2005, <http://mediamatters.org/items/200510280006> (quoting *The O'Reilly Factor* (Fox News television broadcast Oct. 27, 2005)).

⁷⁷ See, e.g., Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027 (2004).